Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No.

In The

SUPREME COURT OF THE UNITED STATES

ESTATE OF RICHARD RICCI and ANGELA J. RICCI,

Petitioners,

v.

SALT LAKE CITY CORPORATION, a Municipal Corporation; RICK DINSE; DON BELL; JERRY L. MENDEZ; and MARK SCHARMAN

On Petition For Writ Of Certiorari To The United States Court of Appeals for the Tenth Circuit

---

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

With particularity, the Questions presented are, to wit:

1. Whether the United States Court of Appeals for the Tenth Circuit Violated Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986) and Leatherman v. Turrant County Narcotics Intelligence and Coord. Unit, 507 U.S. 163, 113 S. Ct. 1160, 122 L. Ed 2d 517 (1993), When It Held "There is no requirement in Rule 56 that discovery be complete before summary judgment can be entered."?

2. Whether the United States District Court, District of Utah Violated Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986) and Leatherman v. Turrant County Narcotics Intelligence and Coord. Unit, 507 U.S. 163, 113 S. Ct. 1160, 122 L. Ed 2d 517 (1993) When It Granted Summary Judgment Without First Allowing Petitioner "Adequate Discovery" First?

"Yes." District Court Did Not Allow Petitioner Any Discovery Whatsoever! This Supreme Court held in Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986):

> "In our view, the plain, language of 56(c) mandates the entry of summary judgment, after *adequate time* for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."

Id., at 322.

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INTRODUCTION

This is an appeal of a §1983 action dismissed by summary judgment, wherein the Estate of Richard Ricci and Angela Ricci (hereinafter "Ricci") sued the Utah State Prison and the Salt Lake City Police Department for wrongful death.

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, **subjects, or causes to be subjected**, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983 (emphasis added). "Ricci" accused the Utah State Prison of being directly responsible for Mr. Ricci's death and Salt Lake City Police Officers for "causing" Mr. Ricci to be wrongfully subject to mistreatment which led to his death." (App. 21, 24). Ricci's case against the Police Department was a "proximate cause" claim. The City must have reasonably foreseen that the false allegations they made in the Elizabeth Smart Investigation against Ricci claiming he was responsible for the abduction of E.S. would lead to a more rigorous prison confinement and disparate treatment.

In this matter the district court terminated the litigation prematurely without first allowing a single discovery request to be answered by the City Defendants, despite that a discovery order was entered on 11/12/2004 (App. 17-20) setting a discovery cutoff date of 3/31/2005. (App. 18). The Attorney Planning Meeting was held on 10/20/2005 and the City Defendants filed their motion for summary judgment on 12/01/2004 (App. 10) despite the dispositive motion cutoff date was 5/30/2005. (App. 20).

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF UTAH

The Estate of Richard Ricci and Angela Ricci (hereinafter "Ricci") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the tenth Circuit in this case, after the Tenth Circuit refused to reverse judgment of the United States District Court of the Central District of Utah granted summary judgment without first permitting "adequate discovery."

OPINIONS BELOW

The decision of the United States Court of Appeals for the Tenth Circuit affirming summary judgment issued on May 17, 2006 and that court's denial of a petition for rehearing en banc was issued on June 19, 2006. They are contained in the Appendix at App. 1-6 and App. 7-8, respectively. The Order of the district court is Appendix at App. 9-16.

JURISDICTION

The final decision of the United States Court of Appeals for the Tenth Circuit denying Ricci's Petition for Rehearing En Banc was entered on June 19, 2006. (App. 7-8). The jurisdiction of this Court to review this matter is invoked under 28 U.S.C. § 1254(1). This petition is due on or before September 18, 2006 and is therefore timely.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following Constitutional provisions are involved in this case:

I. The Due Process clause of the Fifth Amendment, which provides, inter alia:

> No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

II. The Due Process clause of the Fourteenth Amendment, which provides, in Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No

> State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

III. An Act of Congress, 42 U.S.C. § 1983, quoted verbatim on page 1 above.

STATEMENT OF THE CASE

In this matter, the district court granted Salt Lake City Defendant's summary judgment against Ricci without permitting Ricci "adequate discovery" as required by both Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986) and Leatherman v. Turrant County Narcotics Intelligence and Coord. Unit, 507 U.S. 163, 113 S. Ct. 1160, 122 L. Ed 2d 517 (1993). This Court in Celotex specifically stated:

> "In our view, the plain, language of 56(c) mandates the entry of summary judgment, after ***adequate time*** for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."

Id., at 322. On appeal, Ricci argued the discovery issue to the Tenth Circuit. The Tenth Circuit rejected Ricci's appeal, claiming on page 4 of its May 17, 2006 *Order and Judgment* "There is no requirement in Rule 56 that discovery be complete before summary judgment can be entered. *Pub. Serv. Co. Of*

Colo. v. Cont'l Cas. Co., 26 F.3d 1508, 1518 (10th Cir. 1994)." In light of Celotex and this Court's 1993 decision, Leatherman, the Tenth Circuit could not be more wrong, and it appears that the Tenth Circuit has at least continually been wrong since 1994, according to its own citation to the Pub. Serv. Co. of. Colo. decision. Leatherman, like the Ricci's appeal we both § 1983 actions. In 1993, in Leatherman, this Court applied the same Celotex standard mandating that summary judgment after discovery was the proper method of disposing of frivolous § 1983 claims. In this matter, the Salt Lake City Defendants argued that Ricci's claims were frivolous. Ultimately it obtained a summary judgment dismissal, however, said summary judgment was premature in that no discovery was permitted. Summary judgment was filed days after the period of discovery commenced. A scheduling order had only been in effect for 19 days before the Salt Lake City Defendants moved for summary judgment.

REASON FOR GRANTING THE PETITION

Certiorari Should Be Granted In This Case Because The Tenth Circuit Has Disregarded Celotex *And* Leatherman U.S. Supreme Court Decisions For A Minimum Of 12 Years, With This Case Being The Morecent Departure And Beginning With The Pub. Serv. Co. of. Colo. Decision.

As stated above, this Court's decisions of Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986) and Leatherman v. Turrant County Narcotics Intelligence and Coord. Unit, 507 U.S. 163, 113 S. Ct. 1160, 122 L. Ed 2d 517 (1993), both mandate summary judgment only "after adequate time for discovery."

> "In our view, the plain, language of 56(c) mandates the entry of summary judgment, after ***adequate time*** for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."

Id., at 322 (interpreting Federal Rules of Civil Procedure 56). In this case, the Tenth Circuit's decision affirming the district court's summary judgment after only 19 days of discovery when the Court entered a scheduling order and the parties had agreed to a period of four months of discovery was an abuse of discretion contrary to what the Tenth Circuit believes about Rule 56.

As indicated in the *Order and Judgment* in this case, the Tenth Circuit believes that "There is no requirement in Rule 56 that discovery be complete before summary judgment can be entered." (citing to its own 1994 case, Pub. Serv. Co. of Colo. v. Cont'l Cas. Co., 26 F.3d 1508, 1518 (10th Cir. 1994). (App. 4).

It is a well settled Rule of Civil Procedure that generally discovery may not be conducted until after the parties have agreed to a litigation schedule pursuant to Rule 26(f)(1) which is adopted by the court and turned into a scheduling order. In this case, the Attorney Planning Conference was conducted on 11/15/04. (App. 17). The Scheduling Order was signed by the Honorable David Nuffer on 11/12/04. (App. 20). Both parties propounded discovery, including Interrogatories, Requests for Production of Documents, Requests for Admissions and Requests for Depositions. The City propounded their discovery on October 22, 2004. (App. 10). Ricci responded quickly to the City's discovery requests on November 8, 2004. (App. 10). The City Defendants never did respond to Ricci's discovery, instead the City Defendants moved for a protective order seeking to bar further discovery. (App. 11). The court granted the protective order.

Based upon Ricci's lack of personal knowledge admitted in her discovery responses, the district court ultimately granted summary judgment in favor of the City Defendants. (App. 8-16). Beforehand and in response to City Defendants' motion for summary judgment, Ricci moved for 56(f) relief, which included requests for discovery and an extension of time to respond to summary judgment. (App. 11). Ricci's 56(f) motion was also denied. The district court and subsequently the Tenth Circuit Court of Appeals effectively denied Ricci of minimal due process and open access to the courts.

Pursuant to Celotex, Leatherman, Federal Rules of Civil Procedure 56, and the law as set out by this Court, the trial court should have allowed a reasonable period of discovery prior to determining whether or not there were material issues in dispute, within 19 days of the beginning of discovery, it is completely unknown what the City Defendants' position was on material issues. It would be virtually impossible to know there were disputed fact with inadequate discovery. The defendants had in their possession thousands of papers of investigation into the E.S. kidnapping, many of which dealt directly with Ricci. None of the investigation involving Mr. Ricci was disclosed by the defendant at any time.

In the City Defendants' Initial Disclosures the City is required to disclose defenses and their support thereof pursuant to Rule 26(a)(1). They disclosed nothing relevant. How then could the trial court and the Tenth Circuit ignore the instructions of this Court provided in Celotex since 1986 and Leatherman in 1993.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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ADDENDUM

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ESTATE OF RICHARD RICCI; ANGELA RICCI,

Plaintiffs-Appellants,

v.

SALT LAKE CITY CORP., a municipal corporation; RICK DINSE; DON BELL; JERRY L. MENDEZ; MARK SCHARMAN,

Defendants-Appellees,

and

STATE OF UTAH; CLINT FREIL; DR. RICHARD M. GARDEN; LEWIS P. BAILEY, R.N.,

Defendants.

No. 05-4185
(D.C. No. 2:03-CV-749-TS)
(D. Utah)

ORDER AND JUDGMENT*

Before **BRISCOE, McKAY,** and **BRORBY,** Circuit Judges.

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 24(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without

On behalf of the estate of her deceased husband Richard Ricci and herself, plaintiff Angela Ricci sued Salt Lake City, individual Salt Lake City police officers, and state defendants under 42 U.S.C. § 1983. She appeals the district court's denial of her motion for a continuance under Rule 56(f) of the Federal Rules of Civil Procedure and its grant of summary judgment in favor of the Salt Lake City defendants. Exercising our jurisdiction under 28 U.S.C. § 1291, we affirm.

BACKGROUND

On June 5, 2002, a young girl was abducted from her Salt Lake City home. Shortly afterwards, Salt Lake City Police Department officers publicly identified Mr. Ricci, a parolee who had worked as a handyman in the missing girl's home, as a potential suspect. The city defendants interviewed him and obtained arrest warrants for crimes he had admitted, including the theft of several items from the girl's residence at an earlier time.

Mr. Ricci was arrested by state officers on June 14, 2002 for an unrelated parole violation and returned tot he Utah State Prison. He was held in maximum security because, as the deputy warden stated in deposition testimony, "[g]iven the notoriety of his circumstances, it would not [have been] wise to place him in population, which would endanger his life." Aplt. App. At 130. While in custody, Mr. Ricci suffered a massive cerebral hemorrhage and died on August 30, 2002. Months later, the missing girl was found and her accused kidnappers were arrested.

On August 29, 2003, Ms. Ricci filed this lawsuit, alleging violations of her husband's civil rights through defamation, false arrest, unlawful detention, baseless prosecution, false imprisonment, cruel and unusual punishment, and wrongful death. The state defendants reached a settlement with Ms. Ricci. The city defendants, however, sought summary judgment under Rule 56 of

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(cont.) oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

the Federal Rules of Civil Procedure. The city defendants relied primarily on Ms. Ricci's discovery answers, dated November 8, 2004, which conceded that she had no factual support for asserting that they were involved in Mr. Ricci's arrest, detention, or death. As additional legal grounds for summary judgment, they argued that defamation does not generally rise to the level of a § 1983 action and that the baseless prosecution claim failed because the city's theft charges against Mr. Ricci did not end in his favor. On the city defendant's motion, the magistrate judge assigned to the case stayed discovery until after the district court ruled on the summary judgment motion.

Ms. Ricci did not respond to the substance of the summary judgment motion. Instead, she requested a continuance under Rule 56(f). The accompanying affidavit asserted that, with additional discovery, she could gather evidence supporting her speculation that the city defendants conspired with the state defendants to coerce Mr. Ricci's confession by setting restrictive conditions of confinement. The district court denied Ms. Ricci's Rule 56(f) motion and granted defendant's summary judgment motion.[1]

DISCUSSION

In her appellate brief, Ms. Ricci argues that the district court abused its discretion in denying her Rule 56(f) motion and that summary judgment was inappropriate because the case turns on questions of motive.[2] This court reviews the district court's Rule

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1 The city defendants also filed a motion under Fed. R. Civ. P. 11 for sanctions against Ms. Ricci's attorney. The court's denial of the motion is not an issue in this appeal.

2 We note that the issues discussed in the argument section of Ms. Ricci's brief are somewhat inconsistent with her statement of issues. In the statement of issues section, she phrases the issues as: "(1) Whether the trial court was unduly prejudiced to conclude that Ricci lacked evidence so soon into the discovery phase during litigation?" and "(2) Whether the trial court erred in denying [her] 56(f) request so as to allow a

56(f) ruling for abuse of discretion and its summary judgment ruling de novo. *Trask v. Franco,* No. 04-2078, 2006 WL 1075595, *3 (10th Cir. Apr. 25, 2006) (stating Rule 56(f) standard); *Smith v. Cummings,* Nos. 05-3180, 05-3262, 2006 WL 1067305, *2 (10th Cir. Apr. 24, 2006) (stating summary judgment standard).

Rule 56(f)

There is no requirement in Rule 56 that discovery be complete before summary judgment can be entered. *Pub. Serv. Co. of Colo. v. Cont'l Cas. Co.,* 26 F. 3d 1508, 1518 (10th Cir. 1994). Rule 56(f), however, grants discretion to the district court to delay ruling on a summary judgment motion while the opposing party conducts additional discovery.[3] The party seeking more time must provide an affidavit identifying the facts that are not available and what steps she has taken to obtain those facts. *Comm. for the First Amendment v. Campbell,* 962 F.2d 1517, 1522 (10th Cir. 1992). And the affidavit must do more than simply allege that further discovery is necessary; it "must demonstrate precisely how additional discovery will lead to a genuine issue of material fact." *Ben Ezra, Weinstein & Co. v. Am. Online Inc.*, 206 F.3d 980, 987 (10th Cir. 2000). "Moreover, merely asserting that the evidence supporting a party's allegation is in the hands of the opposing party is insufficient to justify a denial of a motion for summary judgment under Rule 56(f)." *Jensen v. Redevelopment Agency,* 998 F.2d 1550, 1554 (10th Cir. 1993) (quotations and alterations omitted).

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proper response to Defendant's [sic] motion for summary judgment based [sic]?" Aplt. Br. At 1.

3 Rule 56(f) provides:

> Should it appear from the affidavits of a party opposing the motion [for summary judgment] that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Ms. Ricci's Rule 56(f) filings were concentrated on criticizing the city defendants' discredited suspicions that Mr. Ricci was responsible for the child's abduction. She also asserted that an additional fourteen depositions would uncover admissible evidence of genuine issues of material fact.

As the district court recognized, Ms. Ricci presented "only a barrage of inferences" linking her intended discovery to the city defendants' potential liability. Aplt. App. At 337, 347. She failed to explain how the contemplated depositions would enable her to oppose the operative facts: Mr. Ricci was arrested by state agents for a parole violation, he was incarcerated in a state facility. Under these circumstances, the district court did not abuse its discretion in denying Ms. Ricci's Rule 56(f) request.

Summary Judgment

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). We examine "the record and all reasonable inferences that might be drawn from it in the light most favorable to the non-moving party." *Palladium Music, Inc. v. EastSleepMusic, Inc.*, 398 F.3d 1193, 1196 (10th Cir. 2005).

Ms. Ricci claims that entry of summary judgment was inappropriate because the city defendants' motivation is an issue to be determined by a factfinder. She proceeds from a correct premise. We have observed that if plaintiff claims a constitutional violation, "summary judgment may be precluded because questions concerning defendant's motives or knowledge must be determined." *Seamons v. Snow*, 206 F.3d 1021, 1028 (10th Cir. 2000) (quotation omitted). This is true if "a necessary element of the claim for relief presents an inquiry into the state of mind of one or more of the parties." *Id.* at n.2 (quotation omitted).

Here, however, the city defendants' motivation is irrelevant to our summary judgment analysis. On the record before us, there is no genuine dispute about eh city defendants' lack of involvement in the conditions of Mr. Ricci's confinement and his unfortunate death. In the context of this case, their reasons for singling out Mr. Ricci as a

suspect have no legal significance. *See Mitchell v. Maynard,* 80 F.3d 1433, 1441 (10th Cir. 1996) (stating that proof of personal participation is essential to recovery on a § 1983 claim).

Further, Ms. Ricci has no § 1983 cause of action for defamation. *See Siegert v. Gilley,* 500 U.S. 226, 234 (1991) (stating that there is no "constitutional protection for the interest in reputation"). And there is no evidentiary support for a claim based on malicious prosecution because the city defendants charged Mr. Ricci with only his admitted thefts. *See Roska ex rel. Roska v. Peterson,* 328 F.3d 1230, 1244 (10th Cir. 2003) (using state law as a starting point for a constitutional claim of malicious prosecution and explaining that Utah requires a showing of criminal proceedings initiated for an improper purpose and without probable cause against an innocent plaintiff, along with proof that the proceedings were terminated in favor of the accused). The district court properly granted the city defendants' summary judgment motion.[4]

The judgment of the district court is AFFIRMED.

Entered for the Court

Wade Brorby
Circuit Judge

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4 Ms. Ricci also devotes a section of her brief to an assertion that entry of summary judgment was premature. Aplt. Br. At 28-30. This section simply re-works her Rule 56(f) argument and we decline to address it separately.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ESTATE OF RICHARD RICCI; ANGELA RICCI,

Plaintiffs-Appellants,

v.

SALT LAKE CITY CORP., a municipal corporation; RICK DINSE; DON BELL; JERRY L. MENDEZ; MARK SCHARMAN,

Defendants-Appellees,

and

STATE OF UTAH; CLINT FREIL; DR. RICHARD M. GARDEN; LEWIS P. BAILEY, R.N.,

Defendants.

No. 05-4185

ORDER

Before **BRISCOE, McKAY,** and **BRORBY,** Circuit Judges.

Appellants' petition for rehearing is denied. All panel members voted to deny rehearing. Judge Brorby voted to deny panel rehearing and declined to vote on the en banc petition.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested

that the court be polled, that petition is also denied.

Entered for the Court
ELISABETH A. SHUMAKER, Clerk

by: /s/signature
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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

THE ESTATE OF RICHARD RICC, AND ANGELA RICCI, AN INDIVIDUAL

Plaintiffs,

v.

SALT LAKE CITY CORP., ET. AL,

Defendants.

ORDER

Civil No. 2:03-CV-00749 TS

Judge Ted Stewart
Magistrate Judge David Nuffer

1. A hearing was held in this matter on July 6, 2005. The City defendants were represented by Morris O. Haggerty and J. Wesley Robinson. Plaintiffs were represented by D. Bruce Oliver. The following Motions were at issue: Motion For Judgment On the Pleadings brought by plaintiffs; Motion to Refuse Judgment, In The Alternative, Motion for Enlargement of Time to Respond to Defendants' Motion for Summary Judgment and Leave to Conduct Discovery brought by plaintiffs; Motion for Summary Judgment

brought by defendants Salt Lake City Corporation, Rick Dinse, Don Bell, Jerry Mendez, and Mark Scharman (hereinafter the "City defendants" or "defendants"); Motion for Sanctions brought by the City defendants; Motion to Stay Further Pleadings.

2. Having received and considered the Memoranda filed in support of and opposing the above listed Motions, having heard oral argument from the parties, and good cause appearing therefor

IT IS HEREBY ORDERED as follows:

Procedural Background

3. Plaintiffs filed their lawsuit on August 29, 2003 against the City defendants and various defendants associated with the State of Utah. Docket No. 1. The State defendants were dismissed on September 30, 2004. Docket No. 37.

4. On October 22, 2004, the City defendants served their First Set of Discovery on plaintiffs. On October 28, 2004 the City defendants served their Second Set of Discovery. The discovery inquired as to the evidentiary basis for plaintiffs' claims including the involvement of each named defendant in plaintiffs' claims and facts supporting various allegations made in the Amended Complaint.

5. On November 8, 2004, plaintiffs served their Responses to Discovery. Plaintiffs provided no information whatsoever as to any Interrogatory. Most responses stated: "Angela Ricci lacks sufficient information to formulate a response to this interrogatory." Plaintiffs did not identify a single document. Plaintiffs denied almost every Request for Admission, stating "Denied. Plaintiff lacks sufficient information to formulate a response to this Request. The City may be in possession of the document necessary to aid Plaintiff in responding to this request. Documentation should also be in the possession of Adult Probation & Parole." Docket No. 46, Exhibit B thereto.

6. The City defendants filed their Motion for Summary Judgment on December 1, 2004 and their Motion for Sanctions on December 8, 2004. Each Motion cited the Responses to Discovery. The Motions were set for oral argument on March 29, 2005. Docket No. 70. At the request of plaintiffs' counsel because of a conflict in his schedule, the hearing was reset for April 27, 2004. Docket Nos. 73, 74.

7. On April 26, 2005, plaintiffs moved to continue the hearing set for April 27th due to the illness of plaintiffs' counsel. Docket No. 77. The hearing was reset for July 6, 2005. Docket No. 84. On April 27, 2005, the date the hearing had been scheduled to occur on the City defendants' Motion for Summary Judgment and Motion for Sanctions, plaintiffs served Amended Responses to Discovery. See Docket No. 82 (referring to the service of Amended Responses). Although they served Amended Responses to Discovery, plaintiffs have not filed Affidavits regarding the information contained in the Amended Responses.

Ruling on Plaintiffs' Motion for Judgment on the Pleadings

8. Given the defendants' recently filed Amended Answer, the Court finds the plaintiffs' Motion For Judgment On the Pleadings is moot.

Ruling on Plaintiffs' Rule 56(f) Motion.

9. In response to defendants' Motion for Summary Judgment, plaintiffs have opted not to respond to the substance of the motion and rather request the Court to grant a Rule 56(f) Motion for further discovery.[5] Additionally plaintiffs have attempted to revise their discovery responses which explicitly admit that plaintiffs have no evidence to support her claims. The amended response plaintiff has provided fails to address the concerns raised by Salt Lake City, namely the plaintiffs' case is not supported by actual evidence, but rather on the hope that evidence will be found through discovery.

10. In relation to a motion by defendants for a protective order, Magistrate Judge Nuffer addressed the Rule 56(f) Motion issue. While it is somewhat ambiguous as to whether the Magistrate Judge was actually ruling squarely on this issue, the Court has no doubt that the Magistrate Judge's assessment is correct. The Magistrate Judge's order reads:

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5 The Rule 56(f) Motion was filed in the form of a Motion to Refuse Judgment, In The Alternative, Motion for Enlargement of Time to Respond to Defendants' Motion for Summary Judgment and Leave to Conduct Discovery along with a Memorandum in Support.

> The city defendants served discovery on plaintiffs inquiring as to the evidentiary basis for their claims. Plaintiffs answered the discovery, stating they had no evidence to support their claims. In opposing this motion, plaintiffs have not presented any credible assertions that they can obtain such evidence. To satisfy Rule 56(f), a party must articulate a plausible basis for the belief that discoverable materials exist which would raise a trial worthy issue. [Citing Licari v. Ferruzzi, 22 F.3d 344, 350 (1st Cir. 1994)(citations and quotations omitted).] Discovery should be stayed until after the District Court Judge rules on the pending Rule 11 motion and summary judgment motion.

Docket No. 56.

11. This ruling of the Magistrate Judge was not appealed. Giving the plaintiff, however, the benefit of the doubt that he did not deem it to be a dispositive treatment of his Rule 56(f) motion the Court will proceed to deal with that here and now. Tenth Circuit case law is clear on this point: ". . . the party filing the [Rule 56(f)] affidavit must show how additional time will enable him to rebut [the] movant's allegations of no genuine issue of fact." Jensen v. Redevelopment Agency of Sandy City, 998 F.2d 1550, 1554 (10th Cir. 1993) (quoting Patty Precision v. Brown & Sharpe Mfg. Co., 742 F.2d 1260, 1264 (10th Cir. 1984)). Even taking into account plaintiffs' revised discovery responses, the Court finds that plaintiffs fail to show how additional time will enable them to rebut the movant's allegations of no genuine issue of act. The Federal Rules of Civil Procedure require much more than a barrage of inferences such as those plaintiffs presented as evidence supporting their claims. Plaintiffs' counsel was ill advised to proceed against Salt Lake City with such flimsy ammunition in his quiver.

12. As the Magistrate Judge has noted, before plaintiffs attempted to amend discovery, plaintiffs had failed to present any evidence or to make any credible assertions that would justify granting plaintiffs' Rule 56(f) motion. Plaintiffs' 56(f) materials do not explain how additional discovery will enable plaintiffs to oppose the operative facts contained in defendants' Summary Judgment Motion, nor does plaintiffs' response provide any basis for the Court to infer it is likely that the requested discovery would produce such information. It is not enough merely to assert the desired evidence "is in the hands of the [opposing party]. . ." Jensen, 998 F.2d at 1554.

13. The Court will therefore cure any ambiguity left in the Magistrate Judge's order and deny plaintiffs' Rule 56(f) motion.

Ruling on defendants' Motion for Summary Judgment

14. With regard to the Motion For Summary Judgment, summary judgment is proper if the moving party can demonstrate that there is no genuine issue of material fact and it is entitled to judgment as a matter of law. In considering whether genuine issues of material fact exist, the Court determines whether a reasonable jury could return a verdict for the nonmoving party in the face of all the evidence presented. The Court is required to construe all facts and reasonable inferences in the light most favorable to the nonmoving party. "Permissible inferences must still be within the range of reasonable probability, however, and it is the duty of the court to withdraw the case from the jury when the necessary inference is so tenuous that it rests merely upon speculation and conjecture." Dillon v. Fibrebord Corporation, 919 F.2d 1488, 1490 (10th Cir. 1990). Plaintiffs have failed to respond to defendants' Motion For Summary Judgment in any meaningful way and they do not dispute the facts upon which defendants premise their Motion. If the nonmoving party fails to respond, as is the case here, this Court may not grant the motion without first examining the moving party's submission to determine if it has met its initial burden of demonstrating that no material issues of fact remain for trial and the moving party is entitled to judgment as a matter of law. If it has not, summary judgment is not appropriate, for no defense to an insufficient showing is required. Reed v. Bennett, 312 F.3d 1190 1194-95 (10th Cir. 2002).

15. The relevant undisputed facts before the Court are as follows: First, there is no evidence that the city defendants were responsible for Mr. Ricci's arrest, second, there is no evidence that the city defendants influenced the terms of his state incarceration, third, there is no admissible evidence that the city defendants conspired with the State of Utah as to the terms of his confinement or the conditions in which he was kept; and fourth, there is no evidence that the city defendants were responsible for his death.

16. Further, in considering plaintiffs' amended discovery responses, the Court finds that plaintiffs have failed to cure these defects by amendment. While plaintiffs contend that Salt Lake City may have applied pressure on Mr. Ricci to encourage him to admit that

he had a role in an ongoing kidnapping investigation, this does nothing to cure the defects in plaintiffs' Complaint. Second, while plaintiffs argue that the Court should follow a chain of inferences to conclude that the City, in fact, schemed with the State of Utah to determine Mr. Ricci's conditions of confinement, plaintiffs also concede that this chain is premised on the fruits of plaintiffs' proposed discovery bearing out. Plaintiffs rely on significant logical leaps that go well beyond the details of any of plaintiffs' purported evidence.

17. Tenth Circuit case law is clear as to the 42 U.S.C. § 1983 claims which serve as the basis for this action: Section 1983 specifically requires an element of causation. See Tonkovich v. Kansas Bd. of Regents, 159 F.3d 504, 518 (10th Cir. 1998). The plaintiff's burden of demonstrating causation is not satisfied when speculative inferences are necessary to connect its injury to the challenged actions." Nova Health Systems v. Gandy, 388 F.3d 744, 752 (10th Cir. 2004 (internal quotations deleted); see also, Black v. Shaffer, 2005 WL 1244987, *3 (W.D.Ky. 2005) ("When the theory of causation is a matter of pure speculation and is nothing more than an hypothetical argument, the pleadings are insufficient to sustain a compensable § 1983 claim."); Del A. V. Edwards, 1988 WL 137494, *5 (E.D. La. 1988) ("This is the type of "but-for-cause" argument that is essential, but not sufficient, to establish legal causation. The duty to receive reports does not imply a duty to act on them. The argument is the legal equivalent of the saw, "for want of a nail the battle was lost". *The chain of causation is entirely too speculative to establish the Governor's liability under Sec. 1983.* The claim against the Governor was therefore properly dismissed." (emphasis in original). The Court finds that the plaintiffs' amended discovery responses are premised on a series of speculative inferences and, therefore, as a matter of law, baseless.

18. The Court finds that summary judgment is warranted in this case. The undisputed evidence before the Court illustrates that the City defendants were in no way responsible for Mr. Ricci's detention, arrest, or imprisonment. Therefore, plaintiffs have no claim under their First Cause of Action, Counts I and IV against defendants for unlawful detention, false arrest, false imprisonment or falsifying probable cause for his arrest.

19. With regard to the First Cause of Action, Count III, plaintiff has not pled nor could the plaintiff plead that the prosecution of Mr.

Ricci was baseless because there is no showing that the prosecution ended in his favor.

20. Likewise, because the undisputed admissible facts before the Court show that the City defendants had nothing to do with the conditions in which Mr. Ricci was imprisoned, the Court finds that plaintiffs have no claims against defendants for their Second Cause of Action for cruel and unusual punishment during confinement.

21. Following the same logic, because the Court has no evidence that the City defendants had anything to do with the death, the Court grants summary judgment against plaintiffs' Third Cause of Action for wrongful death as well.

22. The only claims remaining are those of plaintiff's First Cause of Action, Count II for libel and slander, which plaintiffs attempt to couch under Section 1983 and the First Amendment. The Court finds that plaintiffs' claim for libel and slander under Count II cannot stand because, even assuming that the city defamed Mr. Ricci, it is not a violation of Section 1983 or the First amendment to defame someone. See Siegert v. Gilley, 500 U.S. 226, 233 (1991). The Court, therefore, grants summary judgment against each of plaintiff's claims brought against the City defendants.

Ruling on defendants' Motion for Sanctions

23. As to the Rule 11 sanctions, the Court notes that plaintiffs' counsel's conduct falls well below that of the professionalism expected by this court. While the Court finds Mr. Oliver's conduct to be unprofessional, the Court does not find it to be sanctionable and the Court will, therefore, deny the Motion for Sanctions.

Ruling on Other Motions

24. Given that the Court grants summary judgment to the City defendants, the City defendants' Motion To Stay and plaintiffs' Motion To Continue are both moot.

Conclusion

25. The claims of plaintiffs against the City defendants are dismissed. Because there are no remaining claims against any

defendants, this action is hereby dismissed with prejudice and on the merits.

Dated this 26th day of July, 2005.

/s/T Stewart
The Honorable Ted Stewart
District Court Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF UTAH
Central Division for the District of Utah

FILED

2004 NOV 12 P 4:15

THE ESTATE OF RICHARD RICCI	**SCHEDULING ORDER**
PLAINTIFF,	Case No. 2:03-CV-00749 TS
vs.	District Judge Ted Stewart
SALT LAKE CITY CORP	Magistrate Judge David Nuffer
DEFENDANT.	

Pursuant to Fed.R. Civ P. 16(b), the Magistrate Judge[1] received the Attorneys' Planning Report filed by counsel. The following matters are scheduled. The times and deadlines set forth herein may not be modified without the approval of the Court and on a showing of good cause.

ALL TIMES 4:30 PM UNLESS INDICATED

1. PRELIMINARY MATTERS	**DATE**
Nature of claim(s) and any affirmative defenses:	
a. Was Rule 26(f)(1) Conference held?	**10/15/04**
b. Has Attorney Planning Meeting Form been submitted?	**Yes**
c. Was 26(a)(1) initial disclosure completed?	**3/31/04**

2. DISCOVERY LIMITATIONS	**NUMBER**
a.. Maximum Number of Depositions by Plaintiff(s)	**10**
b. Maximum Number of Depositions by Defendant(s)	**10**
c. Maximum Number of Hours Each Deposition(unless extended by agreement of parties)	**7**

d. Maximum Interrogatories by any Party to any Party	**25**
e. Maximum requests for admissions by any Party to any Party	**50**
f. Maximum requests for production by any Party to any Party	**25**

	DATE

3. AMENDMENT OF PLEADINGS/ADDING PARTIES[2]

a. Last Day to File Motion to Amend Pleadings	**P-12/30/04**
b. Last Day to File Motion to Add Parties	**D-1/30/05**

4. RULE 26(a)(2) REPORTS FROM EXPERTS[3]

a. Plaintiff	**2/28/05**
b. Defendant	**3/31/05**
c. Counter Reports	**30 days after report**

5. OTHER DEADLINES

a. Discovery to be completed by:

Fact discovery	**3/31/05**
Expert discovery	**within 60 days of report**

b. (*optional*) Final date for supplementation

c. Deadline for filing dispositive or potentially dispositive motions	**5/30/05**

6. SETTLEMENT/ALTERNATIVE DISPUTE RESOLUTION

a. Referral to Court-Annexed Mediation no

b. Referral to Court-Annexed Arbitration no

c. Evaluate case for Settlement/ADR on **3/31/05**

d. Settlement probability:

7. TRIAL AND PREPARATION FOR TRIAL:

a. Rule 26(a)(3) Pretrial Disclosures[4]

Plaintiffs **9/12/05**

Defendants **9/26/05**

b. Objections to Rule 26(a)(3) Disclosures (if different than 14 days provided in Rule)

DATE

c. Special Attorney Conference[5] on or before **10/3/05**

d. Settlement Conference[6] on or before **10/3/05**

f. Final Pretrial Conference **2:30PM** **10/17/05**

g. Trial	Length	Time	Date
i. Bench Trial			
ii. Jury Trial	**5 days**	**8:30AM**	**10/31/05**

8. OTHER MATTERS

Counsel should contact chambers staff of the District Judge regarding Daubert and Markman motions to determine the desired process for filing and hearing of such motions. All such motions, including Motions in Limine should be filed

well in advance of the Final Pre Trial.

Dated this *12* day of *November*, 2004.

BY THE COURT:

/s/David Nuffer
David Nuffer
U.S. Magistrate Judge

1. The Magistrate Judge Completed Initial Pretrial Scheduling under DUCivR 16-1(b) and DUCivR 72-2(a)(5). The name of the Magistrate Judge whom completed this order should NOT appear on the caption of future pleadings, unless the case is separately referred to that Magistrate Judge. A separate order may refer this case to a Magistrate Judge under DUCivR 72-2 (b) and 28 USC 636 (b)(1)(A) or DUCivR 72-2 (c) and 28 USC 636(b)(1)(B). The name of any Magistrate Judge to whom the matter is referred under DUCivR 72-2 (b) or (c) should appear on the caption as required under DUCivR 10-1(a).

2. Counsel must still comply with te requirements of Fed. R.. Civ. P. 15(a).

3. The identify of experts and the subject of their testimony shall be disclosed as soon as an expert is retained or, in the case of an employee-expert, as soon as directed to prepare a report.

4. Any demonstrative exhibits or animations must be disclosed and exchanged with the 26(a)(3) disclosures.

5. The Special Attorneys Conference does not involve the Court. Counsel will agree on voir dire questions, jury instructions, a pre-trial order and discuss the presentation of the case. Witnesses will be scheduled to avoid gaps and disruptions. Exhibits will be marked in a way that does not result in duplication of documents. Any special equipment or courtroom arrangement requirements will be included in the pre-trial order.

6. Counsel must ensure that a person or representative with full settlement authority or otherwise authorized to make decisions regarding settlement is available in person or by telephone during the Settlement Conference.

From my Heart & Soul
Wednesday afternoon 14th
Our day Sweetheart I. do.

Hello my Beautiful Woman Wife

I went to O.M.R. today and they said I'm advancing to the other side. that means I get a phone call and visit once a month and get to shave and I think hot meals! as soon as I get there I will call you my Lover okay. I have a review in thirty day and up the phone call and spending limit in Commissary, all I care about is you, Visiting and calling. I'm excited, I got a letter from the Warden yesterday saying till I'm publicly cleared about the Smarts . . . I will be stuck in Uinta 1. The lieutenant in O.M.R. said all these guys are after me. I said o really he said o yea they are so full of shit here. I talked with two of the gang heads when I went to the dentist! and it all good it's the Cops who are doing the damage. Know what I mean my honey. But that okay. Everyone knows I didn't have anything to do with it and are sticking behind me. I'm trying to get my new Atty to get me polegraph tests again, about the jeep and about Smart. The questions they ask's me were so fucking stupid. I told the Atty Micheal about some of the questions honey he was up out of his chair, say what, those stupid fuckers. I hope to hear something this week again. It Bad I can't hear what's going on in the World. no T.V. Newspaper, Radio, nothing. We could be under attack and I wouldn't know! I was thinking I'm going to start

Page II

numbering my Letters again to honey. make sure you are getting all mine too. this will be #2 okay. can I tell you how much I love you. so much I need more Pie. and miss you so much. Honey my neighbor was asking me who Angela was cuz I guess I was saying your name out loud in a dream. must of been pretty loud huh. Honey I dream about you so much. Have the time I wake with tears in my eyes cuz they are so real. I can't believe how much we are alike. When it comes to feeling & love & love & love. . . . and then I start looking at our pictures. me holding your tummy that Morning when we all ate together at the Casino, We are very happy. Nothing will never change in my heart & Soul and Mind. Honey I can't I'm going to write the Warden and

Part III

beg for our Visit's, I have to do something! let me know! How is it going anyway! (With visiting) Honey how is your Pain? and foot too? And how are you sleeping at night?

Honey you can let Trevor go through my shirts and let him have a few okay! I think he will Like that? there should be a couple up top and hanging that he will Like! I will write him Friday of this Week and mail it the same day. You too my Love. I wrote the Bishop again. Sweetheart all I do is thank him and the church for their help. With Rent bill etc. So at lease you Know! I do appreciate them so much and the Food order's too . . . I feel Bad you are doing it on your own my Love, I just wish I could be there taking care of you. But I guess we will just have to hang in there huh my Sweetie. I'm hoping I git a letter from you tonight that way I can answer it and send this tomorrow. Well till Mail call I'm taking a Break. Love U honey. Honey ask the Bishop if he's getting my letters I've only wrote one this makes two. But check and let me know. Love you.

Just got your letter #2 Baby I love you so much. each time I

Page IV

touch your letters I can feel the love comming from them. I mean it my Beautiful Caring Wife. I love you so much. that makes me sad about misty honey. The Feds and cops are so Stupid, inconsiderate, Assholes on earth. Do anything say anything jerks. Tell misty and Deb I'm sorry and Pete too! I can't believe this, just tell them to tell the truth. Honey I ate one of your pictures. You looked so hot and sexy and gorgeous I couldn't help it. You tasted so filmy. Just Kidding. Honey I'm pretty sure I'm getting your mail. Honey I don't expect ya to write everyday. it wonderful and Sweet you do, But work, Cook, Trevor, Being Mom, clean. I understand, take a Breath my Wife. I love you so much I Know your fighting for me. and will never stop. when I

Page 5

I love only you

was writing down that song I to got a Big lump in my throat. da that has to be our #1 song. I'm glad I cant hear music, cuz when I heard that I would fall apart tell Shawn and the Lady at the 7/11 hello. I have the most sexiest wife in the World.

Honey I want you to know, I know how much you love me! I just Kid about someone hitting on you I Know your faithful totally , and devoted and completely in love with just me. Heart, Body, mind, and Soul. that's why I married you my love. The lights just went off. I will try my best cuz I want this in the mail tomorrow morning.

I wrote to Bishop K. I'm writting Trevor Friday. did he take the Bed apart?

All I can think about is calling and hearing your voice. I want to move now please , just remember about this phone and werid clicks, and the kids playing around. I only get one phone call okay. till I earn some more. okay my love of my life. Loves and Kisses , and Hugs. Angela I love you so much honey. More than Martin loves his Evening outside than Trevor loves money and me to the moon and Back Baby. I love you with all of my Heart and Soul, and never doubt it for one minute! Mrs. Ricci Hang in there to Baby and thank you for everything my Wife. I'm proud of you. I need you too everyday. I know I have you too! I dream about you my Peanuts. Loves & Kisses.

Your Husband

/s/Rick

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June 14, 2006

Elisabeth A. Shumaker
Clerk of the Court
U.S. COURT OF APPEALS
FOR THE TENTH CIRCUIT
1823 Stout Street
Denver, CO 80257

RE: Estate of Ricci, et al. v. Salt Lake City Corporation, et al., case no. 05-4185

PETITION FOR REHEARING EN BANC
Citation of Supplemental Authority – Celotex v. Catrett, 477 U.S. 317 (1986)

Dear Ms. Shumaker:

I write this letter pursuant to Fed. R. App. P. 38(j), having rediscovered pertinent and significant authority after the submission of Appellants' *Petition for Rehearing En Banc*. On page 5 of the Petition, I desire to cite supplemental authority concerning this Court's belief that "[t]here is no requirement in Rule 56 that discovery be complete before summary judgment can be entered." *Order and Judgment* p. 4. In addition to the Supreme Court citation of Leatherman v. Tarrant County Narcotics Intelligence and Coord. Unit, 507 U.S. 163, 113 S. Ct. 1160, 122 L. Ed. 2d 517 (1993), further research reveals that the Supreme Court case on point is Celotex v. Catrett, 477 U.S.

317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). Chief Justice Rehnquist held:

> the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to a judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof.

Id. at 2552-2553.

In light of Celotex, the trial judge abused his discretion when granting summary judgment in light of Plaintiffs' outstanding discovery requests propounded prior to the movant's motion for summary judgment. Also, it is certain that the panel on appeal which affirmed the judgment of the district court was incorrect about its interpretation of Rule 56(c).

Please distribute this letter among the judges to be inserted in the Petition for consideration and review of the May 17, 2006 Order and Judgment.

Best regards, sincerely,

D. BRUCE OLIVER, L.L.C.

s/D. Bruce Oliver

D. Bruce Oliver

DBO/jkj
cc: Morris O. Haggerty